UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NINETEENTH REGION

In the Matter of	)	
	)	
FIRST STUDENT, INC.	)	
	)	**Cases 36-CA-10762**
	)	**36-CA-10766**
and	)	**36-CA-10767**
	)	**36-CA-10848**
OREGON SCHOOL EMPLOYEES ASSOCIATION	)	**36-CA-10870**
	)	

FIRST STUDENT, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully Submitted by:

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This case came before Administrative Law Judge John J. McCarrick in Portland, Oregon on August 9, 10 and 11, 2011 on charges filed by the Oregon School Employees Association (hereinafter referred to as "the Union" or "OSEA") against First Student, Inc. (hereinafter also referred to as "the Company").

On February 17, 2011, the General Counsel filed a Consolidated Complaint (as amended on June 30, and again on July 7, 2011) against First Student alleging violations of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act. Specifically, General Counsel alleged that First Student unlawfully conveyed to the employees that they were not receiving wage increases while engaged in contract negotiations and that wages would not be paid retroactively if the bargaining unit engaged in protected conduct in violation of Section 8(a)(1). General Counsel also alleged that the Company has violated Sections 8(a)(1) and 8(a)(5) of the Act by allegedly engaging in the following unfair labor practices: 1) unlawfully cancelling or delaying wage increases for the school bus drivers represented by the OSEA at the Molalla, Lake Oswego and Gresham, Oregon facilities; 2) unlawfully delaying attendance bonus payments at the Lake Oswego location; 3) unlawfully refusing to bargain in good faith with the OSEA for the Gresham Unit; and 4) refusing to provide the OSEA with information relevant to its performance of duties as the collective bargaining representative for the Gresham Unit.

First Student timely answered the Third Consolidated Complaint on July 20, 2011. On August 9, 2011, Administrative Law Judge McCarrick accepted the General Counsel's final amendments to the Complaint and First Student's denial of such allegations. Administrative Law Judge McCarrick issued a Decision on December 7, 2011.

B. FACTUAL BACKGROUND

First Student, Inc. is a private company that provides student transportation to local school systems. First Student contracts with school districts in Oregon to provide transportation to and from schools for children in the districts. In this vein, First Student maintains a facility in Molalla, Gresham and Lake Oswego, Oregon. (ALJD, p. 2)[1]

1. The Molalla Unit

Since 2007, OSEA has represented the Molalla bus drivers as the exclusive collective bargaining representative. The parties operated under a collective bargaining agreement which was effective, by its terms, from July 1, 2007 through June 30, 2010. (GCX 33). Employees moved one step up the salary schedule each July 1 or upon the first day of the school year for the 2007, 2008 and 2009 school years. (RX 9; Tr. 199). Nothing in the 2007 collective bargaining agreement addressed wages for the 2010 school year. (Tr. 212, 485). The 2007 agreement expired on June 30, 2010. (Tr. 215).

Prior to the expiration of the bargaining agreement, First Student and OSEA commenced negotiations for a successor agreement. (Tr. 203). The parties discussed extending the contract while engaged in negotiations; however, they did not reach or sign an extension agreement. (Tr. 215-16, 485). Because the expired contract was silent regarding 2010 wages and the parties were engaged in negotiating a successor contract with wage increases, the wages at the Molalla location remained unchanged from the 2009 wage scale.

OSEA presented First Student with its first wage proposal on July 27, 2010, subsequent to the expiration of the prior agreement, in which it proposed wage increases that would be made effective and paid retroactively to July 1, 2010. (RX 4; Tr. 216, 276, 487). According to the

[1] Herein, the Decision of the Administrative Law Judge is referenced as "ALJD," exhibits submitted by General Counsel, Respondent and Charging Party are referenced as "GCX", "RX" and "CPX," respectively, and the transcript of the hearing is referenced as "Tr." followed by a page citation.

Union's chief negotiator, Tom Motko, the Union bargained wages with First Student from the time they made their first wage proposal through the end of negotiations. (Tr. 220). First Student engaged in good faith bargaining with the Union and accepted the Union's proposal to increase wage under a nine (9) step wage scale and make it effective retroactively to July 1, 2010. (Tr. 490-91, 619). Ultimately, First Student and OSEA reached an agreement which was ratified on June 8, 2011. (RX 10; Tr. 491). The 2010-2013 collective bargaining agreement included a wage scale in Article 16 that was effective retroactively to July 1, 2010. (Tr. 212, 485; GCX 36; RX 10).

While the parties were engaged in negotiating the successor contract, the Union raised the issue of wage increases at the start of the school year and questioned whether the drivers would get step increase at that time. (Tr. 203, 488; GCX 35). Kim Mingo, First Student's lead negotiator, responded that the collective bargaining agreement had expired and the parties were engaged in negotiations and bargaining for wage increases. (Tr. 488-89; GCX 35). In an effort to toll the back pay for the pending unfair labor practice charge, First Student gave the drivers who were not at the top of the 2009 wage scale a one step pay increase in February of 2011. (Tr. 493-94, 497-98). The new wage scale in Article 16 became effective as of July 1, 2010 and First Student compensated current drivers the difference between the 2009 wage scale and the new 2010 wage scale and did so retroactive to July 1, 2010. (Tr. 238-39, 241, 621).

2. The Lake Oswego Unit

Prior to First Student, the Lake Oswego facility was operated by Laidlaw Educational Services. (Tr. 356, 360-61, 590-91). Under Laidlaw, drivers received wage step increases at the start of the school year in September so long as they had completed a full year of service for the

respective step. (Tr. 293, 304-05, 596, 598; RX 12). The first wage increase granted by First Student occurred at the start of the 2009 school year.

The Union was certified as the exclusive collective bargaining representative of the Lake Oswego drivers in January of 2010. (GCX 1x). Thereafter, the parties commenced negotiations for a first contract on June 18, 2010 whereby the Union presented First Student with a complete contract proposal. (Tr. 289, 296, 308-10, 509; RX 5). Article 15 of the Union's proposal contained a wage scale that made its proposed wage increases effective as of September 1, 2010, and each September 1 thereafter for the duration of the contract. (RX 5 at 25; Tr. 290, 311, 508). In its counter proposals dated August 4, 2010 and August 18, 2010, First Student countered on the wage scale but accepted the Union's proposed September 1 date for wage increases to take effect. (RX 6, 7; Tr. 312-13, 510-11).

In mid-August, the Union was informed by Daryl Jefferson, the location manager, that the drivers would not be receiving a step increase on September 1, 2010 because wages were being negotiated between the parties. (Tr. 294-95, 603). At the August 31, 2010 bargaining session, Kim Bonner, the Union's chief negotiator, raised this issue of step increases with First Student. (Tr. 297, 319, 512-13). Kim Mingo, First Student's chief negotiator, responded that the parties were at the bargaining table to negotiate wages. (Tr. 513). First Student also proposed to pay the negotiated wages retroactively once the contract was ratified so long as there were not any work stoppages. (Tr. 298, 513-14). Subsequently, in October and November the parties continued to bargain over the terms of the contract, including wages, and reached an agreement in December of 2010. (Tr. 314-16). The OSEA membership ratified the agreement that is effective from 2011 through 2013. (Tr. 289; GCX 41; RX 11). First Student adjusted the employees' wages pursuant to the new wage scale in Article 15 of the ratified contract and paid

the employees the difference between the 2009 wage scale and their adjusted 2010 wages retroactive to September 1, 2010 as had been negotiated between the parties. (Tr. 299-300, 325, 339, 357, 361, 516-17, 605).

The Lake Oswego location also had a monthly perfect attendance bonus for drivers, which was a policy that carried over after First Student's acquisition of Laidlaw. (Tr. 520, 606-07). Drivers who earned the bonus in one month were paid the bonus in the subsequent month. (Tr. 521, 607). In the 2010 school year, the first opportunity to earn this monthly bonus was September. (Tr. 523, 607). Although Daryl Jefferson mistakenly failed to pay the September bonus in October, he immediately took action to ensure drivers received their September attendance bonus. (Tr. 522-23, 607-08, 610). Accordingly, drivers who earned the attendance bonus in September of 2010 received their bonus in November of 2010, only one month after it should have been paid. (Tr. 306, 333, 346, 354, 523, 606-08). First Student continued to timely pay the monthly attendance bonus until the contract was ratified, and thereafter, paid the bonus pursuant to the terms of the bargaining agreement. (Tr. 307, 520, 524).

3. The Gresham Unit

The OSEA Chapter 204 was certified as the exclusive bargaining representative for the Gresham drivers in June of 2010. (GCX 1x). On August 19, 2010, prior to the start of the school year, First Student conducted an in-service meeting for the drivers in which safety, new policies, and training topics were discussed.[2] (Tr. 554-55). During the question and answer session, Jennie Seibel, a Gresham driver, asked whether the drivers would receive a wage step increase at the start of the school year in September. (Tr. 39, 157-58, 555). Michael Jourdan, the location

[2] Fernando Gapasin, the OSEA field representative, was also in attendance and introduced during this meeting. (Tr. 38, 555).

manager, responded by explaining that wages are a negotiable item and while the parties were engaged in negotiating wages, there would likely not be an increase. (Tr. 555).

Peter Briggs, First Student's lead negotiator, first contacted the Union to begin scheduling negotiating sessions on September 27, 2010 and offered dates in October to commence bargaining. (RX 3). The parties mutually agreed to meet on January 6, 2011. (Tr. 65). At this meeting, the parties discussed ground rules and the Union presented its first proposal for a complete contract, which included a wage scale. (GCX 13, 14). On January 14, 2011, the parties scheduled additional bargaining meetings for February 7, February 8, March 21, March 22-23, April 15 and June 21-23, 2011. (GCX 15; RX 1). The Union also requested to meet on May 26 or May 27 for additional bargaining; however, Mr. Briggs informed Dr. Gapasin that the proposed May dates were not available due to prior commitments. (GCX 15; Tr. 69, 98-99, 130, 387-88). The Union did not propose any additional dates in May; however, the parties met on the agreed upon dates. (Tr. 895, 130, 387-88).

At the February 7, 2011 meeting, the parties continued to discuss the ground rules and the two areas of disagreement: outside observers and the order of bargaining economics and language items. (Tr. 395-98). On February 8, 2011, the parties reached an agreement on ground rules and agreed to disagree on whether language items would be bargained prior to discussing economic items. (GCX 17; Tr. 64, 107, 109, 300, 317). First Student also presented its first counter proposal on February 8, 2011. (GCX 18). First Student maintained the position that there are hidden costs in language items that will determine its economic package, which would be bargained as a total package. (Tr. 94, 398-400). On August 2, 2011, prior to the completion of the language items, First Student presented its economic proposal in tandem with its fifth language proposal. (GCX 30; RX 5; Tr. 28, 104, 119-20, 406-07, 411, 414).

First Student and the OSEA were scheduled to meet on June 21 through June 23, 2011. Because a decertification petition was filed on June 20, 2011 which raised a good faith doubt whether the OSEA represented a majority of the Gresham employees, Peter Briggs cancelled the meeting. (GCX 28; Tr. 389, 432-33, 435). On June 22, 2011, First Student retracted its refusal to meet and proposed meeting three (3) days the following week of June 27, 2011. (GCX 29; Tr. 102, 390, 436, 455). Dr. Gapasin indicated that the Union was not available the week of June 27, 2011 and proposed meeting on July 11 through 13, 2011. (GCX 29; Tr. 102-03, 390). Peter Briggs responded that the proposed July dates conflicted with previously scheduled negotiations and offered the last week of July or the first week of August. (GCX 29; Tr. 147, 390-92). Because the Union members were not available the last week of July, the parties mutually agreed to meet with a mediator on August 2 through 4, 2011. (GCX 29; RX 1; Tr. 103).

The Union requested the "step up raise sheets and all First Student Policy's [sic] regarding this matter" on August 23, 2010 (GCX 2). The request was initially denied because First Student's processes for adjusting wages are considered proprietary information. (GCX 6, Tr. 49). However, the Company provided the Union with an employee list that reflected the bargaining unit members' personal information, route, average hours, wage rate, hire date and benefits, which was updated and provided to the Union as changes in the bargaining unit occurred. (GCX 20; Tr. 90, 556, 560, 583). On subsequent dates, the Union continued to request "past and current First Student policies regarding annual salary increases...policies regarding regular step or 'step up' pay increases." (GCX 4, 5, 7, 8, 9, 10, 11). This repeated request was denied as First Student does not maintain any policies regarding wage step increases. (Tr. 54, 139, 425-26; GCX 11).

Additionally, on November 2, 2010, the Union requested copies of the revenue contract between First Student and the Gresham-Barlow school district. (GCX 4; Tr. 79, 463). Peter Briggs informed the Union that this information was proprietary but could be obtained from the school district pursuant to a public records request. (GCX 6; Tr. 417-18).

The Union also requested copies of the revenue contracts between First Student and the Sandy and West Linn-Wilsonville School Districts for comparison with its current proposals for Gresham to determine whether First Student requires the same management rights language in all of its bargaining contracts. (GCX 8, 9, 10, 11, 21). As Mr. Briggs testified, he indicated to the Union that a management rights clause is generally included in collective bargaining agreements. (Tr. 458-60). First Student again explained that these contracts are considered proprietary information and not relevant to the bargaining between First Student and OSEA because the drivers are represented by the Teamsters; however, these contracts are public records and can be obtained directly from the school district.[3] (Tr. 422-23, 458-60). Further, Peter Briggs testified that he is not familiar with the two revenue contracts, nor did he rely on or reference these contracts while bargaining with the OSEA.

Finally, the OSEA requested the number of employees and the hours per day that they work in the categories of driver/trainer, special education driver, bus washer, cover driver and translator. (GCX 10). Michael Jourdan responded by providing an updated list of employees which he believed covered this request. (Tr. 560-61). He also indicated that most drivers only work in one category as a bus driver and that the Gresham location does not have the special education, bus washer or translator categories of work. (Tr. 88, 561-62).

[3] Dr. Gapasin acknowledged that he made no attempt to obtain the contracts from the school districts. (Tr. 125).

II. STATEMENT OF THE ISSUES

A. Did First Student fail and refuse to bargain collectively and in good faith with the exclusive bargaining representative of the employees in violation of Section8(a)(1) and (5) of the Act? (Exceptions: 1-4, 6-7, 10-16, 18-20, 22-24).

B. Did the Union bargain over the alleged unilateral actions? (Exceptions: 1, 3, 10)

C. Did First Student's alleged conduct interfere with, restrain, and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act? (Exceptions: 25-30, 32).

D. Are the steps taken by First Student to remedy the alleged violation regarding the attendance bonus and cancellation of the June 21 bargaining meetings sufficient to constitute repudiation? (Exceptions: 8, 17).

E. Do First Student's alleged violations qualify as being a *de minimis* violation of the Act and therefore do not warrant a finding of an unfair labor practice or issuance of a remedial order? (Exceptions: 5, 7, 9, 21, 27, 31).

III. ANALYSIS

A. The remedy ordered by the ALJ to reinstate Rhandy Villanueva must be overruled as there is no evidence in the record, the Complaint or in the OSEA's allegations related to Mr. Villanueva.

The ALJ ordered that First Student reinstate Rhandy Villanueva as part of his proscribed remedy. Specifically, the ALJ ordered:

> The Respondent will be ordered to offer reinstatement to Rhandy Villanueva who it unlawfully terminated and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with eth formula set forth in [citation omitted], with interest as provided for in [citation omitted].
>
> (ALJD p.28, lines 1-6).

The Company is at a loss as to how the ALJ came to this conclusion and proposed remedy. The Company has scoured the record of hearing, the Complaint, and the original charges and has found nothing in evidence related to Mr. Villanueva. The Complaint lacks any allegations of discrimination and at no time during the hearing was this issue ever raised. In fact, the hearing transcript is completely void of any reference to this employee. It does not appear as if a Rhandy Villanueva has ever been employed by First Student.

As there is no evidence in the record pertaining to Mr. Villanueva, this finding must be overruled. The Company requests this matter be remanded to the ALJ so that evidence can be taken on this matter and a proper decision rendered based upon evidence presented.

B. First Student meets the requirements under the *Stone Container* exception because it provided the Union with a reasonable advance notice and an opportunity to bargain wage increases at each of the locations.

The ALJ's finding that First Student "utterly failed to bargain with the Union over the amount to be paid under its extant wage programs" and unilaterally eliminated the annual wage increase is not supported by the credible evidence of record. (ALJD p. 15, lines 46-49). In the Complaint, General Counsel alleged that First Student unilaterally made changes in the terms and conditions of employment for the bargaining unit employees at the Lake Oswego, Gresham and Molalla locations. General Counsel asserted, and the ALJ found, that by delaying a wage step increase at the three locations, First Student has violated Section 8(a)(5) of the Act.

As will be further discussed, First Student satisfied its obligation under *Stone Container* by informing the Union of its intent to maintain current wage rates, and, consistent with *Neighborhood House Association*, conveyed its willingness to bargain over the amount of the annual payments of wages for the 2010-2011 school year. The preponderance of evidence clearly establishes that First Student gave timely notice to the Union prior to the time any wage increase

would have gone into effect and an opportunity to bargain over this mandatory subject as evidenced by the Union's wage proposals for each location that included wage increases and a retroactive date for any wage increases to take effect.

While the NLRB and Circuit Courts have held that it can be a violation of Section 8(a)(1) and (5) of the National Labor Relations Act for an employer to unilaterally change terms and conditions of employment after a new union is certified, substantially all of these decisions also involved Section 8(a)(3) allegations as well, which do not exist in this case. In order to constitute unilateral action in violation of the Act, the changes must be "material, substantial, and significant" to trigger a duty to bargain under the Act. *See Bath Iron Works Corp. and Local 7, Int'l Union of Marine and Shipbuilding Workers of America, AFL-CIO, et. al.*, 302 NLRB 898, 901 (1991), *citing Russ Craft Broadcasting*, 225 NLRB 327 (1976).

It is well established Board law that an employer may withhold increases in wages and benefits from employees whose wages and terms and conditions of employment are being negotiated with the employees' representative. *American Telecommunications Corp.*, 249 NLRB 1135 (1980). The basis of the charges are the assertion that First Student "has a duty to maintain the status quo pending bargaining." First Student understands that generally, parties must maintain the status quo. *Neighborhood House Association*, 347 NLRB 553 (2006). However, the Board has found that there is an exception to the general rule:

> if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice. *Id.* at 554. *See also TXU Electric Co.*, 343 NLRB 1404 (2004); *Stone Container Corp*, 313 NLRB 336 (1993); *and Alltel Kentucky*, 326 NLRB 1350 (1998).

As the ALJ recognized, the employer cannot simply propose elimination of the annual practice but must be willing to bargain over the amount of the annual payment for that particular year. *Neighborhood House Association*, 347 NLRB at fn 4 and 356. In *Stone Container*, the employer notified the union in time for the union to bargain over wages that it would not grant an annual wage increase due to economic reasons. *Stone Container Corp,* 313 NLRB 336 (1993). The Board "concluded that the employer satisfied its bargaining obligation by providing the union with notice and an opportunity to bargain." *Neighborhood House, supra* at fn. 4. Further, the Board stated that the employer did not eliminate the annual increase or decline to bargain, but simply made the decision regarding the increase and gave the union an opportunity to bargain that subject. *Id.*

In *Alltel Kentucky*, the employer notified the union of its intent not to increase wages, as it had done in the past. 326 NLRB 1350 (1998). The Board "adopted the judge's finding that the wage increase was a discrete event and that the employer satisfied its bargaining obligation by giving notice to the union and an opportunity to bargain over its proposal to freeze wages that year." *Neighborhood House, supra* at fn. 4.

In *TXU Electric*, the employer increased the wages of the non-unit members, but not the unit members, even though the employer had a past practice of annually reviewing its salary plan and making any necessary adjustments. 343 NLRB 1404 (2004). The employer notified the union of its intent to maintain the current salary and bargain over the issue. The Board "found that the employer did not violate the Act by changing its past practice of annual salary plan adjustments for unit employees while it negotiated with the union for an initial contract." *Neighborhood House, supra* at fn. 6. Further, the Board found that "where a discrete event occurs every year at a given time, and that negotiations for a first contract will be ongoing at that

time, an employer can announce in advance that it plans to make changes as to that event, as long as the union is given notice and an opportunity to bargain as to those matters." *Id.*

The evidentiary record establishes by a clear preponderance that First Student timely notified the Union of its decision to withhold wage increases until after negotiations and afforded the Union a meaningful opportunity to bargain over that decision. Furthermore, consistent with *Stone Container* and its progeny of case law, First Student conveyed that it was willing to bargain with the Union over the amounts of annual wages for the 2010-2011 school year and did so in good faith.

1. First Student properly maintained the contract wages at the Molalla location while the parties bargained for a successor contract.

Contrary to the ALJ's finding, the evidence establishes that First Student did not unilaterally eliminate the annual wage increase at the Molalla location. Although the expired contract included a wage scale that became effective on July 1 each year for the 2007, 2008 and 2009 school years, this collective bargaining agreement expired on June 30, 2010. (RX 9). There is nothing in that contract that addresses a wage scale for the 2010 school year. The record further establishes that there was no agreement to extend the terms of the expired contract. (Tr. 215-16, 485).

The Board has held that "it is well established that where, as here, the parties are bargaining over a successor agreement, the expired contract continues to define wages and benefits for the unit employees and the employer is required to maintain the status quo until the parties reach a new agreement or bargain to impasse." *Mount Hope Trucking Co., Inc.*, 313 NLRB 262 (1993), *citing NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982), *and NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). In that case, the respondent employer made changes in the wages and benefits after the contract expired. The Board determined that because

1) the parties were engaged in negotiating a successor contract; 2) had not reached impasse; and 3) the union did not waive their right to bargain about changes in the terms of employment, respondent violated Section 8(a)(5) when it unilaterally granted unit employees a wage increase. *Id.*

In this same vein, First Student complied with the expired contract terms by maintaining the wages. It is undisputed that the parties commenced negotiations for a successor contract on June 23, 2010, prior to the expiration of the 2007 agreement. The Company could not unilaterally grant a wage increase to bargaining employees after the expiration of the 2007 agreement without first bargaining with the Union and either reaching a new contract or impasse.

2. First Student bargained with the Union over the wages to be paid to the Molalla bargaining unit members.

The ALJ's finding that First Student "utterly failed to bargain with the Union over the amount to be paid under its extant wage programs" is similarly not supported by the evidence. First Student and the Union expressed their intent to bargain wages as part of an economic package. Clearly, the Union understood this as it conveyed its intentions to bargain these subjects in no uncertain terms through its economic proposals which were submitted after the effective date for wage increases under the expired contract. In fact, the first wage proposal presented by the Union on July 27, 2010 unambiguously indicates its position in Article 16 that the effective date for the negotiated wage scale would be July 1, 2010. (RX 4). In this first proposal, OSEA made changes to the wage rates to reflect an increase and additional steps, and edited the date of the wage rates would become effective to July 1, 2010. This clearly demonstrates the Union seized upon the opportunity to bargain over wage increases and propose that any wage increases would be made retroactive to July 1, 2010. After continued bargaining in good faith, the parties reached an agreement which the bargaining unit members ratified June 8, 2011. (RX 10). Article

16 – Wages contains the negotiated wage scale which includes three (3) additional steps. (RX 10 at 20). More importantly, however, the parties agreed to make the new wage scale effective retroactively as of July 1, 2010.

3. First Student did not have a customary practice of granting wage increases at the Lake Oswego location.

Contrary to the ALJ's finding, First Student did not have a past practice of granting annual wage increases at the Lake Oswego facility. General Counsel offered the testimony of two (2) witnesses to establish that annual wage increases were a customary practice of First Student's. However, Brian McLaughlin and April Corbin only established that First Student was responsible for the wage increase in 2009. (Tr. 337-38, 356, 360-61). Prior to that time, according to the two witnesses, they were employed by Laidlaw Educational Services and received annual wage increases from Laidlaw. It can hardly be said that a practice is "customary" when it has occurred once prior to the alleged change. Despite this credible evidence, the ALJ concluded that First Student had a customary practice of giving annual wage increases at the start of the school year and therefore had a duty to bargain prior to implementing any changes. (ALJD p 15, lines 37-38).

4. First Student announced to the Union its intent to maintain current wage rates at the Lake Oswego location prior to the time any wage increase would have gone into effect and bargained over wage increases with the Union.

The ALJ found that First Student's announcement regarding wage increases was a final decision, and therefore did not constitute a timely notice and opportunity to bargain. First Student submits that the statements made by its representative not only qualify as timely notice but invites the Union to continue bargaining over this decision.

Testimony established that school started in September and that wage increases went into effect on September 1 at the Lake Oswego location. Kim Bonner, the OSEA field representative, testified that she asked about wage increases prior to the start of the school year while the parties were sitting at the bargaining table. (Tr. 297). It is undisputed that Kim Mingo's response was that the employees would not be getting wage increases because the parties were actively engaged in bargaining over wage increases. This statement is supported by the evidence establishing the give and take negotiations contained in each party's respective proposals.

The Union's first proposal was presented to First Student on June 18, 2010 and contained a complete wage scale that increased wage rates and indicated September 1, 2010 as the effective date of wage increases. (RX 5). This proposal clearly indicates the Union's intent to bargain wage increases to be effective September 1, 2010. Moreover, the parties continued to engage in bargaining over wages as demonstrated by First Student's counterproposals for Article 15 - Wages on August 4, and August 18, 2010 with a wage scale accepting the September 1 effective date. (RX 6, 7).

The OSEA admitted that it continued to bargain wage increases with First Student. According to Ms. Bonner, as of August 4, 2010 "we [the Union and First Student] were bargaining that they [wages] would change. I don't know that we'd agreed that they'd change 9/1." (Tr. 312). Kim Bonner further testified that subsequent to that date, they did not discuss the wage step increases further because the Union had "other issues that were more pressing" and they were focused on getting a contract so that wages could be paid retroactively to September 1. (Tr. 315). The parties subsequently reached an agreement in December of 2010 and the contract was ratified January 4, 2011. Included in the completed contract at Article 15 – Wages is a wage scale that is made effective as of September 1, 2010. (RX 11). Upon ratification, First Student

adjusted the wages for the bargaining unit employees and paid the difference between the unchanged wage rates and the new contract wage rates.

Clearly, the OSEA new or was put on notice that First Student was bargaining wage increases to be effective on September 1, 2010 for the Lake Oswego location. Because as of September 1, 2010, the parties had not reached an agreement nor had they reached an impasse, First Student maintained the status quo. *See TXU Electric Co.*, 343 NLRB 1404 (2004). Moreover, OSEA was provided the opportunity to bargain over and, in fact, seized upon that opportunity to bargain wage increases for the Lake Oswego bargaining unit members.

5. First Student's delay in paying the attendance bonus at the Lake Oswego location was not a material change of a condition of employment.

Contrary to the weight of the evidence, the ALJ found that First Student made a unilateral change to the terms of employment at the Lake Oswego facility by discontinuing the monthly attendance bonus. However, the evidence clearly establishes that First Student never discontinued the attendance bonus for the drivers. The testimony of Brian McLaughlin and Kim Bonner reveal that the September attendance bonus was paid in November and continued through ratification of the agreement.

McLaughlin testified that he earned the attendance bonus for the month of September 2010. (Tr. 343). Although McLaughlin did not receive his bonus in October, as he expected, he testified that he did receive his bonus for September and October in November of 2010. (Tr. 344).

The ALJ also credited the testimony of Kim Bonner in rendering his finding. However, Bonner is not a driver and did not know the attendance record of the drivers at the Lake Oswego location. Her testimony regarding this issue was based entirely on incorrect hearsay. Because

McLaughlin's testimony was the only direct evidence that was presented on this issue, the evidence established that he is the only driver who attained an attendance bonus for the month of September 2010.

Indeed, as General Counsel acknowledged, First Student paid the September bonus, albeit one month later than McLaughlin expected. (Tr. 520). First Student promptly paid the September attendance bonus when Mr. McLaughlin called attention to the fact that it was not paid with his October payroll check. It is undisputed that the attendance bonus was paid with the November payroll.

Contrary to this evidence, the ALJ concluded that First Student ceased the attendance bonus at the Lake Oswego location. However, General Counsel failed to establish that any other bargaining unit employees were affected by the delayed payment of the September attendance bonus thereby failing to meet its burden of proof. McLaughlin was the only driver who received his September bonus one month later than expected. First Student did not discontinue the attendance bonus program. Moreover, there was no material change to the terms and conditions of employment, just a delay in the payment of McLaughlin's September attendance bonus. *See Bath Iron Works Corp.*, 302 NLRB at 901. The delay of one month's payment of an attendance bonus for one employee is hardly a "material, substantial, and significant" unilateral action that would trigger a duty to bargain under the Act. Accordingly, First Student was not in violation of the Act when it delayed the payment of September's attendance bonus by one month.

6. The delayed payment of the attendance for one month to one employee, if found to be a violation, is at best a *de minimis* violation.

The ALJ erred in finding that the delayed payment of the attendance bonus did not constitute a *de minimis* violation. Assuming *arguendo* that the aforementioned action is found to

be a violation, it is a *de minimis* violation at best. The Board has previously held that certain conduct, limited in impact, significance, and effect does not rise to the level of constituting a violation, even though the same conduct, if engaged in on a more widespread basis, or under circumstances in which its impact can be anticipated to be significant, would constitute a violation. The Board has often found such cases involve *de minimis* conduct not rising to the level of a violation, and to find a violation would not serve the purposes of the statute. *See, e.g.*, *Bellinger Shipyards*, 227 NLRB 620 (1976); *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973); *Wichita Eagle &Beacon Publishing Co.*, 206 NLRB 55 (1973); and *Square D Co.*, 204 NLRB 154 (1973).

General Counsel only established that McLaughlin experienced a one month delay in receiving his attendance bonus. McLaughlin was paid his September attendance bonus in November and continued to earn and receive a monthly attendance bonus until the contract was ratified. First Student respectfully submits that delaying the payment of the attendance bonus by one month to one driver only one time was so isolated and insignificant that it constitutes a *de minimis* violation of the Act, and as such the ALJ's finding should be vacated.

7. First Student gave timely notice to the Union of its intent to maintain current wages at the Gresham location and conveyed its willingness to bargain over this decision.

It is undisputed that any announced wage increase would have gone into effect at the Gresham location at the start of the school year, after Labor Day. (Tr. 155, 553). Prior to the start of school, First Student conveyed its intent to maintain status quo on wage rates and bargain over this mandatory subject, contrary to the ALJ's findings. On August 19, 2010, First Student conducted a mandatory in-service meeting for the Gresham school bus drivers. Also in attendance was the Union's field representative, Fernando Gapasin. During this in-service,

Jennie Seibel, a school bus driver, asked if the employees would get a wage step increase at the start of the school year. Michael Jourdan responded that the parties were engaged in negotiations and wage increases were a topic for bargaining. Indeed, as the evidence establishes, the Union has presented wage proposals during negotiation sessions and engaged in bargaining over this mandatory subject with First Student.

The testimonial evidence establishes that Dr. Gapasin was made aware of First Student's intent to maintain current wage rates prior to the August 19 meeting. In rendering his decision, the ALJ accepted Dr. Gapasin's testimony that the first time he learned that the employees would not be receiving a wage increase was at an in-service meeting on August 19, 2010. (Tr. 147). However, Jennie Seibel, a school bus driver and bargaining unit member, credibility testified that she initiated the questions regarding the wage increases at the August 19 in-service meeting. (Tr. 190-91). When asked why she asked the question, Ms. Seibel responded "I had heard that we weren't going to be getting a raise and so I just wanted to confirm it." (Tr. 192). Seibel further testified as follows:

Question:	Okay. You said you had heard you're not getting a raise, and you wanted to confirm. Who did you hear that from?
Seibel:	If I recall it was at one of the Union meetings.
Question:	Was it a union official making the statement?
Seibel:	I want to say it was Fernando.
***	
ALJ:	But the union meeting where you heard about not getting a pay raise, how long before that August 19th meeting do you think it was?
Seibel:	I do not remember.
ALJ:	I know you don't –

Seibel: Probably within a couple weeks when we had our CAT teams going on and talking to people regarding the Union.

(Tr. 192-193).

In light of this inconsistent evidence, Dr. Gapasin's testimony is highly suspect. Clearly, the Union, and more specifically Dr. Gapasin, had timely notice of First Student's intent to maintain wage rates and intended to bargain over wage increases.

8. Subsequent to the timely notice of First Student's intent to maintain current wages, the parties commenced negotiating a wage scale.

Contrary to the ALJ's finding, the evidence establishes that First Student demonstrated a willingness to bargain over wages with the Union. Although the OSEA failed to promptly demand to bargain over First Student's decision to maintain the status quo while bargaining, the parties eventually commenced negotiations for a first contract. OSEA's first proposal included Article 14 – Wages which defined wage increases and proposed that these wage increases became effective retroactively to July 1, 2010 (GCX 14 at 15). By its first proposal, the Union was undeniably bargaining over the wage increases and changing when those increases would take effect. During subsequent bargaining meetings, the Union continued to propose wage increases to take effect retroactively on July 1, 2010 in its Article 15 - Wages. (GCX 22, 24; RX 8). The evidence clearly establishes that the Company accepted and considered the Union's proposed wage scale and effective date for wage increases, and presented the Union with a counterproposal that contained a wage scale in Article 18 - Wages. (GCX 30).

Because the parties are currently engaged in good faith negotiations over wage increases and their effective date, First Student continues to maintain the status quo for drivers at the Gresham location. As with the Lake Owego location, once the contract is ratified, First Student

will make any necessary adjustments to the wage rates and abide by the terms of the ratified contract.

9. First Student's communication of its intent constitutes timely notice under the *Stone Container* exception.

The ALJ's finding that First Student presented the Lake Oswego and Gresham bargaining units with a final decision rather than a proposal to maintain current wages conflicts with *Stone Container* and its progeny of cases. As previously stated, the employer satisfies its burden when it gives the union advance notice and the opportunity to bargain. *See Stone Container, supra; Neighborhood House Association, supra.* In *Neighborhood House Association*, the Board found that the employer met the requirements under the *Stone Container* exception even though employer simply made the decision regarding a wage increase and gave the union an opportunity to bargain. *Id.* at 1105. The Board explained that the employer did not communicate to the union that it would refuse to entertain counterproposals on the issue, nor did it propose to eliminate the practice altogether. Rather it proposed to implement its wage increase proposal only if the union agreed to finalize the term, otherwise employer would withhold the increase and continue to bargain over the amount of the increase. *Id.*

Although First Student did not present the Union with a written proposal to maintain wages at the start of the 2010-2011 school year, it nevertheless conveyed this intent to the Union which is consistent with Board precedent. Moreover, as the evidence clearly reveals, First Student provided the Union with the opportunity and, in fact, bargained with the Union over wage increases and the time they took effect.

Based on the foregoing, it is evident that the OSEA was provided notice and a meaningful opportunity to bargain wages and continues to do so with First Student. Therefore, First Student respectfully submits that the weight of the evidence establishes that First Student

did not violate Sections 8(a)(1) and (5) of the Act when it maintained wages while bargaining wage increases with the Union. The ALJ's factual finding that First Student failed to bargain over the amount to be paid under its wage programs is contrary to the weight of the evidence and should be vacated.

10. Any alleged violation of the Act was subsequently resolved at the Molalla and Lake Oswego locations when the respective contracts were ratified.

The ALJ found that First Student violated the Act by unilaterally cancelling wage increases at Molalla and Lake Oswego and those actions were not *de minimis* violations. Assuming *arguendo* that the aforementioned are found to violate the Act, First Student respectfully submits that it is a *de minimis* violation, at best. Once the contracts were ratified by the bargaining units, the evidence establishes that First Student promptly adjusted the wage rates to reflect the negotiated wage scale in the bargaining agreement. First Student also paid the difference between previous wage rates and the new wages retroactive to July 1, 2010 for Molalla and the start of the school year for Lake Oswego. Accordingly, any violation of Section 8(a)(5) has been resolved and the effects of any violation found are so insignificant that it constitutes a *de minimis* violation, at best.

C. First Student expressed a hard bargaining strategy related to its business interest when it conveyed its intent to bargain language items prior to addressing economic items.

The ALJ's finding that First Student failed and refused to negotiate economic matters with the Union, unless and until agreement was reached on all non-economic items is inconsistent with the credible evidence of record. First Student submits that its intention to negotiate language items prior to negotiating economic items was part of its hard bargaining strategy motivated by its business purpose. Additionally, the ALJ failed to acknowledge that

First Student in fact bargained over items with an economic impact and did, in fact, engage in negotiating economic items while language items remained open for discussion.

Section 8(d) of the Act states that the duty to bargain requires an employer to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment...but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C.§ 158(d) (2006). The Supreme Court recognized in *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), that there is a mutual duty to confer in good faith with a desire to reach an agreement, but that the intent was to give parties "wide latitude" in their negotiations. The Board has similarly held that "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *See Industrial Electric Reels*, 310 NLRB 1069, 1071-72 (1993) (*citing Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). The Board recognized that an employer fulfills its statutory duty to bargain in good faith where it demonstrates a "real desire to reach agreement and enter into a collective bargaining agreement" at the bargaining table. *Id.* at 1071. "The determination of whether a party making such an offer has bargained in bad faith must be based on the totality of that party's conduct." *Id.* at 1072.

Bargaining in good faith is a duty on both sides to enter into discussions with an open and fair mind and a sincere purpose to find a basis for agreement touching wages and hours and conditions of labor. *Globe Cotton Mills v. N.L.R.B.*, 103 F.2d 91, 94 (C.A.5 1939). Though there is no concise definition, the duty of parties to "confer in good faith" essentially means that the parties make an honest attempt to reach an agreement by offering proposals, considering the other side's proposals, and making counterproposals. Conduct that has been considered an

indication of good faith includes exhibiting willingness to compromise, continuing to advance substantive proposals, responding to proposals, and continuing to meet and confer. *See WPIX Inc.*, 293 N.L.R.B. 10 (1989). However, parties are not required to agree to any proposal or to make a concession.

Throughout negotiations with the OSEA, First Student has demonstrated its willingness to obtain a contract and engage in good faith negotiations by scheduling bargaining sessions and reaching agreement on many of the language items. First Student's conduct and statements of its intent to bargain language items before bargaining economic items is consistent with a hard bargaining strategy. Moreover, First Student has never refused to consider or discuss economic items with the Union.

1. Item 6 of the ground rules requires the presentation and agreement of the complete economic package which First Student was not in the position to present until August.

The ALJ's dismissal of First Student's interpretation of the ground rules as "pure sophistry" is inconsistent with the intent of the parties. Item 6 of the agreed ground rules states "as tentative language agreements are achieved they shall be noted accordingly, with the parties so acknowledging via initialing appropriate documents. The economic package shall be agreed upon as a whole rather than having tentative agreements for respective portions thereof, it being understood that this does not preclude acknowledgement that certain matters may be agreed upon during the bargaining process." (GCX 17). Based on this language, it is clear that only the economic items were meant to be negotiated as a whole package, which is clearly consistent with First Student's intention to propose and bargain economic items together rather than in piecemeal. (Tr. 398-400). Although the Union continued to present complete contract proposals,

First Student was not in a position to accept or reject their economic package because the costs of the contract were uncertain.

Moreover, First Student does not assert that item 6 mandates acceptance of language items before discussing economic items as the ALJ admonishes, but rather, that under this ground rule it reserved the right to put together a complete economic package to be discussed with the Union in its entirety rather than in piecemeal. Indeed, Dr. Gapasin acknowledged that "the Act makes no hard and fast rules about how we are to bargain so long as we can take care of our business." (CPX 1).

2. First Student bargained items with an economic impact as early as March 2011.

The ALJ also failed to acknowledge that First Student did, in fact, bargain economic items while language and non-economic items were still open for discussion. As Peter Briggs explained, and Dr. Gapasin acknowledged, language items may have hidden costs associated with them and can impact First Student's economic proposals. (Tr. 94). Indeed, some of the examples Dr. Gapasin provided as being language items that were considered to have economic ramifications had been discussed and agreed upon by the parties as early as March 22, 2011. (Tr. 144-45).

The credible evidence further establishes that First Student backed down from its hard bargaining position and submitted an economic proposal while the parties were engaged in a negotiation session on August 2, 2011. (Tr. 446; GCX 30). This proposal was submitted the same date as First Student's fifth language proposal. (RX 2). Clearly, there were language items that had not been resolved prior to the submission of First Student's economic proposal.

Considering the totality of the evidence, it is evident that First Student engaged in good faith negotiations and by its actions demonstrated a real desire to reach an agreement with the OSEA for the Gresham bargaining unit. Accordingly, the ALJ's findings should be vacated.

D. The ALJ's determination that First Student failed and refused to meet at reasonable times between April 15, 2011 and August 2, 2011 is not supported by the evidence.

Contrary to the evidence, the ALJ found that First Student failed and refused to meet at reasonable times between April 15, 2011 and August 2, 2011 in violation of Section 8(a)(5). However, the ALJ failed to even minimally scrutinize the evidence establishing that although the Union attempted to expedite matters, the Union itself was not available at times which the Company proposed. It is interesting to note that the ALJ made no reference to the Union's lack of availability which contributed to the absence of more frequent meetings.

1. First Student was unavailable on the only dates proposed by the OSEA between April and June and expressed this unavailability to the Union pursuant to the parties' practice.

In finding that First Student, and specifically Peter Briggs, failed to bargain in good faith due to a busy schedule, the ALJ failed to consider that the only dates First Student did not meet between April and June[4] were May 26 and 27. The record clearly establishes that in January, Peter Briggs confirmed upcoming meetings scheduled for February 7 and 8 and offered additional dates in March, April and June. (GCX 15). Dr. Gapasin accepted Mr. Briggs proposed dates and offered two additional dates, May 26 or May 27. Because Mr. Briggs had previous commitments, he was unable to schedule a meeting on either date. Subsequently, the Union did not propose any additional dates to meet.

[4] The ALJ characterized this time as a "large gap in bargaining;" however, the record clearly establishes that the parties had a practice of meeting once per month for bargaining sessions. Failing to meet in May when the parties had met every month since bargaining commenced in December can hardly be classified as a "large gap" in the course of bargaining, especially when dates were confirmed for meetings in June.

Notwithstanding, during the time between meetings, First Student continued to communicate with the Union and in fact, accepted and prepared responses to the Union proposals. The Union emailed a proposal dated April 17, to Mr. Briggs for the Company's consideration, but withdrew the proposal before First Student could respond. (GCX 24, 25). Additionally, the Union communicated via email with Mr. Briggs and presented yet another proposal for consideration on May 18, 2011. (GCX 27; RX 8). It was in response to this proposal that First Student prepared its fifth language proposal. (Tr. 414-15).

2. At no time between June 21, 2011 and August 2, 2011 did First Student refuse to meet at a reasonable time and place for purposes of bargaining with the Union.

The ALJ also found that First Student failed and refused to meet at reasonable times between June 21, 2011 and August 2, 2011 in violation of Section 8(a)(5). However, in reaching his finding, the ALJ ignored the evidence that First Student offered several dates between June 21 and August 2, which the Union expressed its unavailability.

As previously stated, the parties have a pattern of rejecting and proposing dates that will accommodate their schedules. First Student contacted Dr. Gapasin on June 22, 2011 to arrange for additional bargaining dates. He offered June 27 through June 29, 2011. (GCX 29). However, as Dr. Gapasin testified, the Union was not available on those dates to meet. (Tr. 102; GCX 29). Dr. Gapasin then proposed alternative dates of July 11 through 13, 2011, noting that "key" bargaining committee members were unavailable July 15 through July 31. (Tr. 103, 147; GCX 29). Because the July dates conflicted with other scheduled negotiations, Mr. Briggs was not available to meet. However, he proposed meeting either the last week of July or the first week in August (Tr. 392; GCX 29). The Union accepted the August dates.

The ALJ's finding that First Student refused to meet with the Union at a reasonable time and place is simply not supported by the record. The only dates proposed by the Union which First Student was not available were July 13, 14 and 15. First Student attempted to meet with the Union during the month of June and July, and, understandably, the Union committee members had previous commitments and were unable to meet. The record reveals that Peter Briggs further accommodated the Union by rearranging his schedule to meet on the mutually agreed August dates.

3. The Union contributed to the absence of more frequent meetings.

The ALJ found that between certification on June 18, 2010 and August 2, 2011, the parties met less than once a month. (ALJD p. 19, lines 1-2). However, he calculated that First Student and the Union met fifteen times over fourteen months, with eleven of those meetings between December and August, a period of eight months. This averages out to a minimum of bargaining once a month. (ALJD p. 18, lines 16-20). In addition to being inconsistent, his finding fails to acknowledge the Union's contribution to the lack of more frequent meetings.

Although the ALJ sustained an objection regarding scheduling dates in early fall (Tr. 128-29, 384-85), he nevertheless relied on it to render his findings concerning the frequency of meetings. (ALJD p. 18, lines 16-20). First Student submits that the ALJ should have allowed and considered evidence that the Union failed to respond to requests made by First Student to set up meetings in the early fall of 2010. Peter Briggs contacted Dr. Gapasin on September 27, 2010 and again on September 30, 2010 offering to meet in October for purposes of bargaining a first contract. (RX 3). Because the Union failed to timely respond, the parties did not meet in October. In fact the parites did not meet until December of 2010, causing a delay in the start of negotiating by two months. While admonishing First Student for its lack of availability, the ALJ ignored Dr.

Gapasin's testimony that he did not respond to Mr. Briggs request to meet in October because "I don't think we [the Union] were available in October." (Tr. 128).

Moreover, the Union was not available on two separate dates offered by First Student. As previously stated, First Student offered to meet with the Union on June 27 through 29. However, Dr. Gapasin responded that the Union committee was not available. The Union also informed First Student that the bargaining committee was not available from July 15 through 31, which ruled out First Student's offering to meet the last week of July. Because of the Union's unavailability, bargaining sessions were delayed until the mutually agreed date of August 2.

The evidence clearly establishes that the Union also contributed to the frequency at which the parties met for bargaining. For these reasons, First Student respectfully requests that the ALJ's findings that First Student failed to meet at reasonable times be vacated.

E. Steps taken by First Student to remedy the alleged unilateral cancellation of the June 21 bargaining meetings were sufficient to constitute repudiation.

General Counsel alleged, and the ALJ found, that Respondent violated Section 8(a)(5) of the Act when it unilaterally cancelled the bargaining sessions scheduled for June 21 through June 23, 2011. First Student respectfully submits that although it cancelled the negotiations scheduled for June 21, 2011, its actions of contacting the Union and proposing new dates for negotiations effectively repudiated its alleged violation.

In *Passavant Memorial Area Hospital*, the Board articulated a standard for how an employer can avoid liability for unlawful conduct. 237 NLRB 138 (1978). To be effective under *Passavant*, an employer's repudiation must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct and accompanied by assurances to employees that the employer will not interfere with the exercise of their rights under Section 7 of

the Act. *Id.* at 138-39. As the ALJ further cited, "there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication." *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977).

Applying the Board's standards for repudiation, the evidence clearly supports that First Student's actions immediately after its alleged unlawful conduct sufficed to retract its cancellation and effectively repudiated its alleged violation. Indeed, as the General Counsel admitted at the hearing, the Company "promptly reversed course" after it cancelled the June 21, 2011 meeting. (Tr. 29).

However, the ALJ referred to the other allegations of bad faith bargaining to support his finding that the repudiation did not meet all of the elements of *Passavant*. First Student submits that his reasoning is inconsistent. As the ALJ commented at the hearing, it was clear to him that First Student retracted its refusal to meet. (Tr. 390, 454). He further indicated in his Decision that "though Respondent repudiated its withdrawal of recognition..." (ALJD p.18, lines 26-27).

Further evidence of the ALJ's inconsistent reasoning is his reliance on First Student's delay in paying monthly attendance bonuses at Lake Oswego as having an impact and undermining the Union's support at the Gresham location. (ALJD p. 18, lines 9-10; p.20, lines 29-30). The record clearly establishes that these are separate locations with separate bargaining units and even separate OSEA field representatives. (ALJD p.2-3; GCX 1). The Complaint is devoid of any allegation that First Student failed to compensate Gresham employees for an attendance bonus.

Moreover, the "proscribed illegal conduct" on which the ALJ relies to find that the elements of *Passavant* have not been met are alleged to have occurred prior to the publication of the repudiation, not after the publication as the ALJ indicated. (ALJD p. 20, lines 29-30). As the

Board stated in *Pope*, there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corp.*, 228 NLRB at 340 (emphasis added). Indeed, there is nothing in the record alleging that First Student committed any violations after publication of the repudiation to the Union on June 22, 2011. As of June 22, 2011, First Student attempted to schedule additional meetings with the Union and provided the Union with its economic proposal to bargain wage increases.

The weight of the evidence establishes that First Student effectively repudiated the alleged unlawful conduct. Mr. Briggs communicated the Respondent's repudiation the following day, thus it was timely. He conveyed in no uncertain terms that First Student would continue to bargain with the OSEA which addresses the specific nature of the alleged unlawful conduct and guaranteed that the employees could exercise their Section 7 rights by continuing to engage in good faith bargaining. The ALJ and the General Counsel recognized this repudiation. Therefore, First Student requests that the ALJ's finding be vacated.

F. First Student lawfully withheld the requested information.

The ALJ also found that First Student failed to furnish the Union with wage step-up information, the Gresham Revenue Contract, the Sandy and West Linn-Wilsonville Revenue Contracts, and the number of employees in each job classification, all of which he determined to be relevant and useful to the Union. The ALJ, therefore, found that First Student violated Section 8(a)(5) of the Act.

It is well settled that an employer has a statutory obligation to supply information that is potentially relevant and will be of use to the union in fulfilling its responsibilities as exclusive bargaining representative. *NLRB v. Acme Industrial Co.,* 385 US 432, 435-36 (1967). However, there is no obligation for the company to open its financial books to the union absent a claim that

by company that it is unable to pay the union's bargaining demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *see also Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 960–61 (D.C. Cir. 2003), *denying enf.* 335 NLRB 322 (2001).

1. First Student communicated to the Union that it does not maintain policies for wage step increases.

General Counsel failed to establish that the requested wage "step-up" information existed. The evidence reveals that the Union requested "past and current polices regarding annual salary increases. For example, policies regarding regular step or 'step up' pay increases." (GCX 2, 3, 4, 5, 8, 9, 10, 11). First Student does not maintain policies, past or current, that address annual salary. First Student conveyed on more than one occasion to the Union that it does not have a policy regarding step increases and therefore cannot provide such information. Indeed, Dr. Gapasin acknowledged this in one of his requests wherein he stated "I acknowledge that on 3/21/11 that you said that First Student has no step-up policies, but I am requesting them again anyway." (GCX 11). On several occasions, Mr. Briggs explained to the Union that the Company's processes for adjusting wages are considered proprietary information. (GCX 6). General Counsel did not establish by a preponderance of the evidence that the requested policies concerning wage "step-ups" has been unlawfully withheld from the Union because General Counsel did not establish that such policies exist. The Company simply cannot provide that which does not exist.

2. The wage scale the ALJ determined to be in existence contains the same information already provided to the Union.

The ALJ drew the inference that the Gresham location maintains an annual wage scale, contrary to the evidence. The only evidence the General Counsel presented as to the existence of these records was the testimony of Cory Blacksmith who testified that, once in 2006, he saw a

wage sheet listing wages and years of service. (Tr. 159-62; 171-72). Isobel Nordstrom also testified that she *once* saw a wage sheet *sometime after 2000*, but could not recall the date or the details of the sheet she observed. (Tr. 178-79). However, Michael Jourdan credibly explained that the Gresham location does not have a wage scale nor does it maintain any policies regarding wage increases. (Tr. 425-26). Although he eluded to a spreadsheet which he created that lists the number of employees in each wage, Mr. Jourdan credibly testified that the information contained in this spreadsheet, is the same information that has already been provided to the OSEA several times. (Tr. 584; GCX 20).

Notwithstanding, Respondent did provide the current wage rates for bargaining unit members in Gresham and provided the Union with updated lists as the bargaining unit changed. (GCX 20). The employee list provided to the Union details the employees' average daily hours and wage rate. (GCX 20). The Union could have very easily extrapolated a wage scale from this information; yet refused to do so.

3. First Student lawfully withheld the Gresham Revenue Contract because it was not relevant to the bargaining between the parties.

The ALJ found that First Student made the Gresham Revenue Contract relevant then refused to provide the revenue contract to the Union when requested on February 8, 2011. His finding, however, is not supported by the evidence. The Company submits that the Gresham Revenue Contract was properly withheld as it was not relevant to bargaining.

The Union made its first request for the Gresham Revenue Contract as early as November 2, 2010. (Tr. 79; GCX 4). At that time, the contract was not relevant as negotiations had not commenced and the request was denied. Although portions of the Gresham revenue contract arguably became relevant on February 8, 2011, the Union submitted its request on March 22,

2011. (GCX 10). A review of subsequent proposals by First Student reveals that the language incorporating portions of the revenue contract were withdrawn as of the next bargaining session on April 15, 2011. (GCX 23 at 4). This removal of the language no longer made the revenue contract relevant to the Union's bargaining obligations. Therefore, First Student was not obligated to produce the Gresham revenue contract to the Union.

4. Assuming the denial of the Union's request constitutes a violation of the Act, it is at best a *de minimis* violation.

The Union had the opportunity to obtain the revenue contract since it was first informed on November 2, 2010 that the contract is a public record, and failed to do so. The time frame from when the revenue contract was arguably relevant and requested in March until it was rendered moot in April, spanned only one month during which time the parties did not meet. It is also undisputed that the Union has in fact obtained a copy of the revenue contract which resolves the ALJ's concern that First Student might renew its previous management rights language at future bargaining sessions. Therefore, First Student's action of denying the Union's request for the Gresham revenue contract is so isolated and insignificant that it constitutes a *de minimis* violation of the Act, and as such the ALJ's finding should be vacated.

5. First Student lawfully withheld the Sandy and West Linn-Wilsonville Revenue Contracts because they are not relevant to the Gresham bargaining.

As the General Counsel noted, "where the requested information concerns matters outside the bargaining unit, the union bears the burden of showing the potential relevance of the requested information." Memorandum GC 11-13, *Guideline Memorandum concerning Parties' Obligations to Provide Information Related to Assertions Made in Collective Bargaining*, May 17, 2011. The revenue contracts between First Student and the School Districts in Sandy, Oregon and West Linn, Oregon, are not relevant to the Union's obligations to its bargaining unit

members at the Gresham facility, contrary to the ALJ's finding. Notwithstanding, the Union was informed that these documents are a matter of public record and could be obtained in that fashion.

The ALJ found that the reason the Union requested these contracts was because First Student "represented at the bargaining table that its proposed managements rights language was required in all of its contracts, and the Union wanted to verify that assertion." (ALJD p. 11, lines 34-37). As will be further addressed, General Counsel failed to establish that the Sandy and West Linn-Wilsonville Revenue Contracts are relevant to the bargaining between First Student and the OSEA. Furthermore, the Union failed to attempt to obtain this information from the Teamsters or the school districts. For these reasons, this allegation must be dismissed.

a. First Student did not make the Sandy and West Linn-Wilsonville Revenue Contracts relevant during bargaining.

The evidence establishes that the Sandy and West Linn-Wilsonville locations are separate entities from Gresham with separate bargaining units represented by the Teamsters. (Tr. 81-83, 380, 443). Peter Briggs credibly testified that he did not mention or even make reference to these locations in the course of bargaining with the OSEA for the Gresham unit, nor has he relied on them in preparing any of First Student's proposals. (Tr. 422-23). Contrary to the ALJ's finding, Mr. Briggs explained that in the course of negotiations over the management rights clause he engaged in bargaining rhetoric and made a general statement that management rights language is generally found in other labor contracts within the industry. (Tr. 458-59). He credibly testified that he never referred to either of these contracts at the bargaining table. (Tr. 422-23). Certainly revenue contracts from other school districts represented by another union are not relevant to the OSEA bargaining a contract for the Gresham drivers who service the Gresham School District.

b. The Union had the relevant documents necessary to evaluate First Student's alleged assertion regarding its management rights proposal.

The ALJ found that First Student interjected outside revenue agreements into bargaining when it represented at the bargaining table that its proposed management rights language, incorporating its revenue agreement with the Gresham School District, was required in all of its revenue [sic] contracts. The Union wanted Respondent's agreements with the Sandy and West Linn-Wilsonville School Districts to verify that assertion." (ALJD p.22, lines 44-48).

Assuming *arguendo* that First Student made that assertion at the bargaining table, the Union had the documents necessary to verify the statement, namely the bargaining agreements with the Teamsters. Indeed, Dr. Gapasin testified that he obtained copies of the collective bargaining agreements from Sandy and West Linn facilities from the Teamsters. (Tr. 81-83). If, as the ALJ found and albeit referenced incorrectly, First Student asserted that the proposed management rights language was contained in all of its collective bargaining agreements, then the Union certainly was in a position to verify that statement without the revenue contracts. As the evidence establishes, the Union had in its possession other bargaining agreements. In fact, Dr. Gapasin testified that he referred to the management rights language in the Teamsters' bargaining agreements. (Tr. 81-83). He therefore, was able to verify any alleged statement that First Student requires the proposed management rights language in all of its bargaining agreements. First Student submits, based on the foregoing, that the revenue contracts from Sandy and West Linn-Wilsonville would not be relevant to verifying such a statement. Accordingly, the ALJ's findings should be vacated.

6. First Student has not refused to provide the number of employees in each job classification as it has provided several lists to the OSEA detailing the employee information, including wages, average daily hours, and routes.

The ALJ further found that First Student violated Section 8(a)(5) because it refused to produce the number of employees in each job classification. This was based on his finding that the information provided to the Union did not contain the requested information, contrary to the weight of the evidence.

On March 22, 2011, the Union sought "the number of employees and their work hours per day that fit into the following categories: driver/trainer, special education driver, bus washer, cover driver and translator." (GCX 10). Michael Jourdan responded by providing an updated list of employees with their routes, wages and hours, which he believed covered this request. (Tr. 560-61). He credibly testified that most drivers only work in one category and that the Gresham location does not have the special education, bus washer or translator categories of work. (Tr. 88, 561-62). Dr. Gapasin testified that First Student informed him that it did not have the categories of work described in his request. (Tr. 88). He further testified that he had received several employee lists from First Student which described the routes, average hours worked and rates of pay for the drivers. (Tr. 89).

First Student asserts that it complied with the request to the extent it encompassed necessary and relevant information. An employer is excused of non-compliance where the request is ambiguous or requests overly broad information, so long as the employer requests clarification or complies to the extent the request asks for necessary and relevant information. *See Azabu USA Co.*, 298 NLRB 702 (1990) *citing A-Plus Roofing*, 295 NLRB 967, 972 fn. 7 (1989); *Barnard Engineering Co.*, 282 NLRB 617, 621 (1987); and *Colgate-Palmolive Co.*, 261 NLRB 90, 92 fn. 12 (1982). As both Mr. Jourdan and Dr. Gapasin credibly testified, First

Student provided several updated employee lists which included the employees' routes, average daily hours and wages. Given that the request sought information for categories that do not exist, First Student complied with the request to the extent possible. Furthermore, it is undisputed that the majority of drivers work in only one classification of job – that of a bus driver – and that providing the average daily hours and routes met the Union's request.

G. Statements made by Daryl Jefferson, Michael Jourdan, and Kim Mingo were lawfully made and therefore did not violate Section 8(a)(1).

With regard to statements made by Daryl Jefferson, Michael Jourdan and Kim Mingo, the General Counsel alleged, and the ALJ found, that these comments constitute a violation of the Act. However, because the statements are absolutely lawful and truthful, First Student submits that the ALJ's findings are without merit.

The law is clear that once a union is certified, an employer has the duty to bargain with the union over the terms and conditions of employment. In *NLRB v. Katz*, 369 U.S. 736 (1962), the U.S. Supreme Court ruled that after employees become represented by a collective-bargaining agent, their employer may no longer make unilateral changes in wages, hours, and other terms and conditions of employment, as it was privileged to do *before* the employees became represented. Thus, the employer is barred from making any unilateral changes in wages or benefits while it is bargaining with the union. Therefore, the statements made by the managers that wage step increases are a topic of negotiations and that wage step increases will not be given while the parties were engaged in negotiating wages is accurate.

1. Daryl Jefferson responded to questions concerning whether drivers would get a wage increase or attendance bonus.

Although First Student instructs its managers to refrain from discussing contract negotiations and wages with the bargaining unit employees, it cannot always be avoided. The

credible evidence establishes that Daryl Jefferson was confronted by bargaining unit employees raising questions regarding whether their wages would be adjusted for a step increase for the 2010 school year and the status of the monthly attendance bonus payments. Jefferson merely explained to the bargaining unit members that wages and bonuses are a negotiated item that would be bargained with their selected bargaining representative and made effective one the parties reached a contract.

In support of these allegations, the General Counsel presented just two witnesses from the Lake Oswego location. Brian McLaughlin stated that on the date of bidding in August of 2010, he asked Jefferson what his rate of pay would be for the upcoming school year. (Tr. 327-28). According to McLaughlin, Jefferson explained that his rate of pay remained unchanged from the previous year because the Company and the Union were engaged in contract negotiations. (Tr. 328, 336). April Corbin also testified that she met alone with Daryl Jefferson and that he explained that wages would be adjusted once the contract was ratified. (Tr. 359).

Regarding the attendance bonuses, McLaughlin also testified that he asked about the pay for the September attendance bonus. Jefferson responded that attendance bonuses would not be paid because that was another subject being negotiated between the parties. (Tr. 333-35).

2. Michael Jourdan responded to a question from a bargaining unit employee concerning whether drivers would get a wage increase.

Similarly, Michael Jourdan responded to a question raised by a driver during the in-service meeting on August 19, 2010. Fernando Gapasin, Cory Blacksmith, Union president, and Gresham bus drivers Isobel Nordstrom and Jennie Seibel testified that they were present at the in-service meeting held on August 19, 2010 and that Jennie Seibel asked whether the drivers would receive the step up at the in-service meeting during the question and answer section. (Tr.

39). According to Dr. Gapasin, Michael Jourdan responded by stating that there would not be an increase until negotiations were complete. (Tr. 40). Further, Jourdan credibly testified that he responded to the question by stating that wages were a negotiable item and while the parties were negotiating there probably would not be an increase in wages. (Tr. 555).

3. At no time did Michal Jourdan attribute drivers not getting a wage increase to the Union.

The ALJ's finding that Jourdan told employees they were not getting a pay raise due to the Union is not consistent with the record. In making this finding the ALJ ignored the inconsistencies in the Union's testimony.

Union President Cory Blacksmith testified that he did not recall who asked "if it was true we weren't getting a raise because of the union" but did recall Jourdan responding that it was true. (Tr. 157). When prompted further, Blacksmith clarified that Jourdan's exact words were "we're not getting a raise because we have to negotiate the contract with the Union first…it has to be negotiated." (Tr. 158). Clearly the ALJ credited Blacksmith's testimony in making his finding that there was not going to be raises because of the Union. However, Blacksmith's testimony is inconsistent with the other credible testimony of record.

Isobel Nordstrom credibly testified that Jennie Seibel asked whether the drivers would be getting a pay raise. Her testimony was that Michael Jourdan's response was "no, because we are bargaining with the Union." (Tr. 181). Jennie Seibel admitted that she asked Michael Jourdan whether drivers were going to get a raise because she had heard a few weeks prior from Fernando Gapasin that they would not be receiving a raise. (Tr. 190, 193). She testified that Jourdan's response was that there would not be an increase because the Union bargaining committee and Cincinnati had to decide on the pay rates. (Tr. 191). As previously stated, Jourdan testified that his response to the question was that wages are a topic to be negotiated by the

parties. A preponderance of the evidence establishes that Jourdan conveyed to the drivers that wages were a topic being negotiated by the parties and that at no time did he attribute not getting raises to the presence of the Union.

4. Statements made by Kim Mingo while engaged in bargaining were lawfully made and were reflection of First Student's bargaining strategy.

The ALJ further found that statements made by Kim Mingo at the bargaining table were a violation of Section 8(a)(1). Specifically, that Mingo made the statement that there would be no raises while bargaining was ongoing and that if the employees struck there would be no raises. However, the evidence is contrary to the ALJ's finding.

First Student Region Human Resources Manager Kim Mingo testified that it has been First Student's practice, in accordance with the National Labor Relations Act, to maintain wages while negotiations are ongoing with the Union. (Tr. 513). Kim Mingo testified that during the course of negotiations, she was confronted by the OSEA field representative, Kim Bonner, questioning about wage increases and explained that the parties were at the bargaining table to negotiate wages. (Tr. 513). As with the aforementioned statements, the evidence establishes that Mingo's statement that the parties were at the bargaining table to negotiate wage increases and that they would not go into effect until there was a ratified contract, are lawful and accurate reflections of the law.

Further, Mingo testified that the parties negotiate wage increases retroactive to the beginning of the school year, and that this was specifically proposed by the Union and agreed upon at the Lake Oswego location. (Tr. 513-15). Mingo explained the Company's proposal to the Union bargaining committee that any negotiated wages increases would be paid retroactively

from the date of ratification to the effective date for wage increases.[5] (Tr. 514). She further testified that First Student proposes retroactive payment as a bargaining tool to avoid and prevent work stoppages. In this case, the Company's bargaining position was that its proposal for retroactive payment of any wage increases remained on the table as long as there were no work stoppages. (Tr. 514). The ALJ erred when he found that Mingo stated there would not be any wage increases if the employees struck.

Moreover, this bargaining strategy does not violate the law. The Board has held that "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *See Industrial Electric Reels*, 310 NLRB 1069, 1071-72 (1993) (*citing Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). Mingo testified that First Student would continue to negotiate in good faith whether wage increases would be paid retroactively so long as the employees did not engage in a work stoppage. This clearly demonstrates First Student's bargaining strategy. Therefore, Kim Mingo's comments during the give and take of negotiating a new contract conveyed First Student's lawful bargaining position and intent to bargain over wages.

5. The aforementioned statements were so isolated and insignificant that they constitute a *de minimis* violation at best.

The ALJ also found that the statements are more than a *de minimis* violation. Mingo made the statement one time in the course of bargaining with the Union bargaining committee. The only employee to testify as hearing this statement was Brian McLaughlin. These statements did not hinder the bargaining sessions nor have a negative impact on bargaining. Rather, the parties reached an agreement shortly thereafter that was ratified. Upon ratification, First Student

[5] Interestingly, General Counsel failed to raise the issue during its direct examination with either witness. The two witnesses called by General Counsel did not testify to this statement made by Kim Mingo until asked on cross examination by the Party-In-Interest. (Tr. 304, 336-37).

implemented and abided by the negotiated agreement to pay wage increases retroactively to the start of the school year.

Similarly, the statements made by Jefferson and Jourdan were made on one occasion to the bargaining unit employees. Each statement was made in the response to a question directed at the manager regarding the topic of wage increases. Based on the extreme isolated nature of these comments, the ALJ's finding should be vacated and the allegations should be dismissed as *de minimis*.

6. The bargaining unit members are eligible to participate in the Retirement Savings Plan and receive matching contributions per the negotiated contract terms.

Finally, the General Counsel alleged, and the ALJ found, that the letter mistakenly sent on November 10, 2010 to Cory Blacksmith informing that non-union participants in First Student's retirement saving plan would receive an employer determined matching contribution in the amount of $250 violated the Act. First Student submits that, contrary to the ALJ's findings, employees at the Gresham location continued to be eligible to participate in the Retirement Savings Plan and receive matching contributions per the negotiated contract rather than the employer dictated matching amount.

Retirement savings plan matching contributions are a mandatory subject of bargaining; therefore, First Student could not unilaterally declare a matching contribution for the bargaining unit employees. It is a violation to promulgate, maintain and publicize an employee pension place which excludes from participation otherwise eligible employees who select to be represented by a collective bargaining representative and are subject to a collective bargaining agreement. *Niagara Wires, Inc.*, 240 NLRB 1326 (1979). The Board stated that the mere maintenance and continuance of a provision in a pension plan, making lack of union

representation one of the qualifications for eligibility to participate, tends to violate Section 8(a)(1). *Id.* at 1452. However, in *Niagara Wires*, the employer specifically admitted to promulgating a pension plan provision which restricted eligibility to only non-union employees. *Id.* at 1451.

Contrary to the ALJ's finding, the case at hand is distinguishable from *Niagara Wires*. First Student has not promulgated a pension plan that restricts eligibility to only non-union employees. Rather, all employees are eligible to participate in the pension plan, regardless of whether they are members of a bargaining unit. The ALJ also erred in finding that employees represented by a union were ineligible for matching contributions. The matching contributions are either at the discretion of First Student or are paid pursuant to the terms and conditions of the collective bargaining agreements. Because the OSEA represented the Gresham employees at the time when the decision was made to pay a matching contribution, the Company could not simply declare a similar contribution for the Gresham employees without bargaining first. The letter which was mistakenly sent to Gresham employee Cory Blacksmith, therefore, is not a violation of the Act.

7. First Student established that the letter was so isolated and insignificant that any violation should be dismissed as *de minimis*.

Assuming *arguendo* that the letter is found to violate the Act, First Student respectfully submits that it is a *de minimis* violation, at best. The Complaint alleges that "employees" were affected; however, only the letter and testimony of former employee Cory Blacksmith were presented in support of the General Counsel's case. (GCX 31).

General Counsel failed to establish that any other bargaining unit members at the Gresham location received the letter regarding the retirement savings plan matching

contributions. General Counsel only introduced the letter specifically sent to Cory Blacksmith. (GCX 31). Cory Blacksmith testified that he received the letter which was directed to non-union employees. (Tr. 165). His testimony was that other drivers received the letter; however, he did not give names or the number of drivers who received this letter. (Tr. 166). Conversely, Kim Mingo credibly explained that Blacksmith received the letter in error because the benefit group's system had not been updated with the Gresham election results. (Tr. 527). Her testimony went uncontroverted. General Counsel's assertion that the letter was a violation of the Act is simply not supported by the record. There is simply no evidence, other than the vague hearsay statements made by Blacksmith, that any other bargaining unit members received the letter, much less, that it had any effect on restraining the employees in the exercise of their rights. Based on the extreme isolated nature of the letter, the ALJ's finding should be vacated.

IV. CONCLUSION

In sum, First Student asserts that the credible evidence of record establishes that it has not violated Sections 8(a)(1) and 8(a)(5) of the Act. Alternatively, the alleged unfair labor practices constitute, at best, *de minimis* violations, if at all. For the reasons set forth above, the decision of the Administrative Law Judge should be VACATED and the unfair labor practice charges should be DISMISSED in their entirety.

Respectfully submitted,

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Dated: January 11, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of First Student, Inc.'s Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge was served by e-file, e-mail and U.S. post-paid regular mail on this 11th day of January, 2012 to the following:

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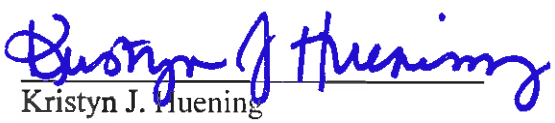

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